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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

DONALD LEE SHIRLEY,
Respondent.

On Appeal from the Supreme Court of California

OPPOSITION TO PETITION FOR CERTIORARI CRIMINAL CASE

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

OPPOSITION TO PETITION FOR CERTIORARI - Criminal Case

ARGUMENT

INTRODUCTION

The petition before this Court represents the denouement of an extensive debate in the California courts over the admissibility in criminal trials of testimony induced with the aid of hypnosis. The debate has been waged, in large part, over witnesses hypnotized by police hypnotists under the tutelage of Martin Reiser, of the Los Angeles Police Department. See note 35, opinion below. The scientific and legal issues have

been widely discussed and have once before been brought before this Court from California. Quaglino v. People of the State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978).

A careful reading of the petition for certiorari in this case reveals that the California Attorney General seeks review in this Court, not of the decision of the California Supreme Court with respect to respondent, SHIRLEY, whose retrial is now commencing in the Superior Court, but only of a prospective ruling of that Court given to "provide the bench and bar with . . . guidance in other litigation . . . ." 31 Cal.3d at 54. That "guidance" may in fact be moot, for reasons set forth below, and the Attorney General does not argue that the decision with respect to respondent, SHIRLEY, is in any way incorrect. For these reasons, there is no "case" or "controversy" presented by the within petition, in violation of Article III, Section 2 of the United States Constitution.

Be that as it may, for reasons which follow, the due process assertions of the California Attorney General are without merit.

I. THE PROSPECTIVE RULING OF THE CALIFORNIA SUPREME COURT MAY PROVE TO BE MOOT.

In June, 1982, the voters of California adopted an initiative measure (Proposition 8) known as the "Victims' Bill of Rights." That initiative measure included addition of Article 1, Section 28(d) to the California Constitution:

> "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, §§ 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

Since this provision explicitly limits judicially-created rules of evidence in California, it may be found to limit the

prospective effect of Shirley. This Court may take judicial notice of the fact that the constitutionality of the Victims' Bill of Rights is currently being considered in Brosnahan, et al. v. Brown, et al., S.F. 24441 (California Supreme Court), and that on July 2, 1982, the California Supreme Court sent to the parties a letter requesting responses to various questions, including whether decisional law on the admissibility of hypnosis evidence has survived the adoption of this provision.[1/]

Because of the above, it is possible that the California Supreme Court will shortly limit the prospective effect of Shirley in similar cases.

1/ Counsel on both sides in this case are also counsel of record in Brosnahan. It might be noted that during a program for the California Continuing Education of the Bar entitled "Practice After Proposition 8," the representative of the California Attorney General's office articulated the position that Shirley is no longer the law. The letter is attached as Exhibit A hereto.

II. THIS COURT LACKS JURISDICTION TO RESOLVE PETITIONER'S CLAIMS.

Petitioner's only serious argument is that it was in some fashion denied due process as a result of the decision of the California Supreme Court to judicially notice scientific literature on hypnosis. Assuming, arguendo, that petitioner's claim is meritorious, it does not follow that this Court can take jurisdiction, because, as the Supreme Court of California made eminently clear, the outcome of this case in no way depended upon the cited scientific literature. The steps in the California Supreme Court's analysis were as follows:

1. The Court determined that hypnosis as a device for enhancing memory of witnesses must first meet the requirements of People v. Kelly, 17 Cal.3d 24, 30 of "general acceptance of the . . . technique in the relevant scientific community."

2. The Court reiterated the holding of Kelly that "it is the proponent of

such testimony . . . who has the burden of . . . demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community." 31 Cal.3d at 54.

3. The Court held that "in the case at bar the prosecutor did not take up that burden and made no such showing. On this ground alone, we would ordinarily be justified in holding the challenge to testimony inadmissible." Id.

4. Solely for the purpose of providing "the bench and bar with . . . guidance in other litigation presenting the same question," the Court took up an examination of the literature, reiterating that it would be guided by the principle that "the burden is on the proponent of the . . . technique to show a scientific consensus supporting its use." 31 Cal.3d at 56.

5. The petitioner totally failed to meet that burden. The Supreme Court held that its review of the literature "demonstrates beyond any doubt that at the present time the use of hypnosis to restore the memory of a potential witness is not generally accepted as reliable by the relevant scientific community." 31 Cal.3d at 66 (emphasis added.) Thus, the California Supreme Court did not rely upon the scientific literature at all for reversing the judgment against respondent, nor did it foreclose the opportunity for petitioner to prove in some future case that a consensus has been reached in the relevant scientific community that hypnosis has become reliable under appropriate safeguards. In short, the "due process" claims in this case cannot affect the outcome of this case but, at most, some unspecified case which may or may not arise in the future.

When the portion of a lower court's

opinion objected to its clearly advisory, this Court has no jurisdiction to review that portion on certiorari. This Court "is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision . . . ." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). Since a decision in petitioner's favor by this Court would have no effect on the outcome of the case or on the rights of respondent, to grant a writ of certiorari in the present case to decide the constitutionality of the California Supreme Court's exercise of judicial notice, would exceed this Court's authority to review "cases" and "controversies." Article III, Section 2, United States Constitution.

Similar problems exist with a grant of certiorari in this case based upon

the California Attorney General's objection to the dictum in the Shirley opinion excepting testimony of hypnotized defendants; see discussion, infra, Part IV of this brief.

Additionally, a grant of certiorari to decide the issues raised by the Attorney General would violate the long-standing principle that this Court will not review cases where there is an independent and adequate state ground for decision. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566, 53 L.Ed.2d 965 (1977). The California Supreme Court was explicit in this case that the result would be the same regardless of its specific conclusions about admissibility of hypnosis evidence generally, since the People failed to meet their burden of showing hypnosis to be reliable under People v. Kelly, supra. Kelly defines a state-law procedure for allowing "scientific" evidence, and the California Attorney General does not

challenge Kelly before this Court. Therefore, there was an independent and adequate state ground for the decision below.

III. THE CALIFORNIA SUPREME COURT'S EXERCISE OF JUDICIAL NOTICE RAISES NO DUE PROCESS ISSUE.

The California Attorney General argues without citation of any authority that he was denied due process as a result of the California Supreme Court's reliance on technical literature for the purpose of providing "the bench and bar with . . . guidance in other litigation." 31 Cal.3d at 54.

However, the furthest this Court has ever gone in limiting judicial notice on due process grounds is to hold that in a trial court, an accused must be "informed at the trial of the facts of which the court is taking judicial notice." Garner v. Louisiana, 368 U.S. 157, 173, 7 L.Ed.2d 207 (1961). Even that principle was questioned by Justice Harlan, who pointed out that "without any such notification this Court has many times taken judicial notice of well-known economic and social facts," 368 U.S. at 195.

In the context of quasi-judicial

administrative proceedings, this Court has long recognized that official notice of technical documents complies with due process as long as adequate notice is given that the documents will or may be considered. See Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 81 L.Ed.2d 1093 (1937); Brown Transportation Co. v. Arkansas-Best Freight, 417 U.S. 281, 42 L.Ed.2d 447 (1974); and Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 89 L.Ed. 1171 (1945). No authority known to counsel exists which limits the constitutional authority of appellate courts to exercise judicial notice in providing "guidance" to "the bench and bar."

Significantly, the California Attorney General had years' notice that the defendants in the cases consolidated for hearing with Shirley before the California Supreme Court were relying in part on the extensive body of technical literature

supporting their position. Most, if not all, of the scientific authorities discussed in the California Supreme Court's opinion were also discussed in briefs and oral argument submitted long before the decision.

The Shirley record is an incomplete record of those matters which were properly before the Supreme Court of California in making its decision. This Court's attention is particularly drawn to a letter dated April 10, 1981, in which the California Supreme Court notified all parties that it would consider the briefs in People v. Johnson, Crim. No. 21624, and People v. Titman, Crim. No. 21625, in reaching a decision in People v. Shirley. See Exhibit B hereto. If this Court is of the opinion that any due process issue could exist, it should have a complete record before it, including the records of all the cases consolidated for hearing in Shirley, and respondent submits that it is the responsibility

of the petitioner to assure that such a record is before this Court.

It should be noted that the brief of amicus curiae, California Attorneys for Criminal Justice, in Johnson and Titman (submitted by counsel for SHIRLEY here) cited 26 separate publications in the technical literature, including all authorities in note 46, 31 Cal.3d at 64; the last three authorities in note 48, 31 Cal.3d at 64; and the authorities in note 52, 31 Cal.3d at 66. Additionally, the appellate committee of the California District Attorneys Association submitted an amicus brief in Johnson and Titman citing eight scientific papers on hypnosis, including Spiegel, "Hypnosis as Evidence," cited in note 49, 31 Cal.3d at 65; Kroger and Douce, "Hypnosis in Criminal Investigations," cited in note 49, 31 Cal.3d at 65; and Reiser, Handbook of Investigative Hypnosis, cited in note 36, 31 Cal.3d at 59. The Attorney General's response brief to the

California Attorneys for Criminal Justice cited additional scientific authorities, including Reiser, supra, and Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," cited in note 34, 31 Cal.3d at 56. Finally, Titman's opening brief on appeal and supplemental brief cited a number of scientific publications. Thus, all parties have relied in the case below in scientific authority, and all the major papers discussed in the opinion of the California Supreme Court were also discussed in briefs and argument.

A dialogue has been carried on in the California courts for several years on the propriety of hypnosis as a tool for enhancing recall by witnesses. That dialogue was first brought to this Court's attention in Quaglino v. State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978). Quaglino relied extensively on scientific literature in petitions both to this Court

and to the California Supreme Court, without any objections from the Attorney General.

The decisions of other state courts in this area have also extensively cited the scientific literature. See, e.g., State v. Mack, 292 N.W.2d 764 (Minn. 1980) and State v. Hurd, 414 A.2d 291 (N.J. Super. 1980), affirmed, 432 A.2d 86 (1981). Thus, it could come as no surprise to the California Attorney General that similar use of judicial notice would be made by the California Supreme Court in this case.

The California Attorney General does not suggest to this Court that the widespread scientific skepticism on hypnosis as a reliable fact-finding tool is misplaced or that the Attorney General was denied the opportunity to show otherwise. Indeed, the contrary is clear; this case would never have gotten this far had the People of the State of California not failed to meet their burden of proof at the trial level.

For all the above reasons, no possible due process issue exists in this case.[2/]

[2/] The California Attorney General also casually suggests, without citation of relevant authority, that the Shirley rule may create an unconstitutional "conclusive presumption" of incompetence to testify. If there were such a constitutional defect, it is unclear that the California Attorney General would have standing to assert it. Moreover, the doctrine of "conclusive presumptions" cannot generally be used by this Court to invalidate rules of evidence designed to protect against untrustworthy testimony. See Usery v. Turner Alcorn Mining Co., 428 U.S. 1, 31-33, 49 L.Ed.2d 752 (1976).

IV. THE ATTORNEY GENERAL'S OBJECTIONS TO THE CALIFORNIA SUPREME COURT'S EXCEPTION FOR TESTIMONY OF HYPNOTIZED DEFENDANTS GIVES THIS COURT NO BASIS FOR INTERVENTION.

The California Supreme Court, in dictum following its ruling on the admissibility of the complaining witness's testimony in this case, noted a possible exception:

> "[W]hen it is the defendant himself - not merely a defense witness - who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused impairing the fundamental right of an accused to testify in his own behalf. People v. Robles (1970) 2 Cal.3d 205, 214-215."

(Modification of opinion, 31 Cal.3d at 918c.)

The scope and extent of the "necessary exception" are left undecided by the California Supreme Court's modified opinion, and the cited authority (People v. Robles, 2 Cal.3d 205, 214-215 [1970]) does not clarify that issue. Robles merely recognized a

"fundamental" right of a defendant to testify on his own behalf extends to testimony which is "irrelevant, immaterial, or incompetent," as suggested by the California Attorney General (petition for certiorari at 34), or which cannot be waived (e.g., by knowingly and voluntarily submitting to hypnosis).

The two-sentence dictum of the California Supreme Court on this issue has all the weaknesses of the decision of the Alabama Supreme Court in McAdory, supra, which led this Court to conclude that no case or controversy existed which warranted intervention by this Court. When an appropriate case of a hypnotized defendant comes before it, the California Supreme Court has a multitude of options open to it, all consistent with its statement in this case. For instance, the Court might hold that knowing voluntary submission to hypnosis constitutes a waiver of the right to testify

or might hold that a defendant must make a showing of reliability, albeit not as stringent as required by People v. Kelly, supra. In the absence of a clear ruling from the California Supreme Court based upon a factual record on the subject, it would be unwise in the extreme for this Court to step into the breach and hold that a denial of due process has occurred.

From a two-sentence statement in the California Supreme Court's decision, the Attorney General seeks to maintain its due process rights have been violated, yet the Attorney General has offered not a single authority from any court in the nation to support its claim. The lack of cited authority for the Attorney General's position is not surprising, because there is none.

The Attorney General's argument may be broken into three sub-assertions: (1) that as a matter of federal constitu-

tional law, the defendant has no right to present evidence which the prosecution in an analogous situation could not present; (2) that the California Supreme Court has no power to grant to criminal defendants greater rights than the federal Constitution recognizes; and (3) that a violation of the asserted limits on the power of the California Supreme Court denies the Attorney General of due process. None of those sub-assertions has any merit.

First, this Court has long recognized the right of criminal defendants to present evidence which might not be sufficiently probative to meet state relevancy requirements. In particular, in Chambers v. Mississippi, 410 U.S. 284, 302, 35 L.Ed.2d 297 (1973), this Court held that state rules of evidence "may not be applied mechanistically to defeat the ends of justice" when, although applied generally they may be "designed to assure both fairness and

reliability," they prevent the defendant on the facts of the case from presenting relevant evidence. This Court has continued to adhere to the principles set forth in Chambers. See, e.g., Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738 (1979). Thus, the California Supreme Court would be in error not to recognize that a "mechanistic" application to defendants of the evidentiary rules set forth in Shirley would violate federal due process when the defendant could establish that his testimony after hypnosis was probative and trustworthy. At least one California appellate court has made similar applications of Chambers; see People v. Reeder, 82 Cal.App.3d 543, 553, 147 Cal. Rptr. 275 (2d Dis. 1978). Chambers and Green may require, for instance, that if a defendant is hypnotized under appropriate criteria for reliability (notes 21 and 23, 31 Cal.3d at 339, decision below), the testimony elicited at trial may not be excluded.

Moreover, there is a clear constitutional distinction between testimony of the defendant and testimony of witnesses against the defendant in the area of hypnosis. While the California Supreme Court chose not to decide Shirley on the basis of the "confrontation clauses" of the California and U.S. Constitutions, it clearly could have done so. Several courts, including the California Supreme Court, have recognized that hypnosis-enhanced memory can block effective cross-examination since it eliminates the subject's legitimate doubts. People v. Shirley, 31 Cal. 3d at 66; People v. Hurd, 432 A.2d 86, 94 (N.J. 1981); and State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980). Thus, hypnosis interferes with the right of confrontation, which this Court has recognized to include a defendant's right to cross-examine witnesses. See, e.g., Ohio v. Roberts, 448 U.S. 36, 65 L.Ed.2d 597 (1980) and Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934 (1965).

Whether or not, as appears from the facts of the numerous cases in the state courts, the Constitution requires a distinction between hypnosis testimony for prosecution witnesses and for the defendant, there is nothing to prevent the California Supreme Court from granting criminal defendants additional protection not specifically required by the United States Constitution. To hold otherwise would totally overturn the basic constitutional principle that federal power to interfere with the states is limited. Only recently, this Court has reconfirmed California's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the federal Constitution." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 64 L.Ed.2d 741 (1980). California's own Attorney General, without reference to any supporting authority, would have this Court for the first time overturn that sovereign right in a case in which

the alleged error of the California Supreme Court was unnecessary for the outcome of the case.

For the Attorney General to make the further claim that a distinction between accuser and accused, which is probably required by the due process and confrontation clauses of the United States and California Constitutions is itself a denial of due process, borders on the absurd; since the California Attorney General has not provided this Court with a single supporting authority, the argument requires no further response.[3/]

[3/] See Rule 21.5, Supreme Court Rules.

CONCLUSIONS

For the above reasons, the California Attorney General's petition for certiorari is totally without merit and should be denied.

Dated: August 10, 1982.

Respectfully submitted,

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July 2, 1982

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Re: S.F. 24441 - Brosnahan et al. v. Brown et al.

Dear Counsel:

In addition to those questions submitted to counsel in our letter of July 1, we would appreciate if counsel would address the following matters:

1. Should the court construe the single subject rule more narrowly for initiatives than for legislation? (See Schmitz v. Younger (1978) 21 Cal.3d 90, 98-100 (dissenting opinion of Justice Manuel).)

2. Does article IV, section 9 apply to initiatives? If so, how does the statement that "A statute may not be amended by reference to its title", but only by re-enactment of the section as amended, affect provisions of an initiative which:

(a) repeal a statute by reference to its title?

(b) declare a statute "inoperative" by reference to its title?

(c) repeal or amend by implication statutes not mentioned in the initiative?

3. In order to determine whether the initiative embraces more than one subject (and possibly in order to determine whether it amends statutes in a manner which violates article IV, section 9), we may have to determine the scope and meaning of the initiative's provisions. We therefore inquire:

(a) What is the substantive effect, if any, of the "right to safe schools" declared in section 3, subdivision (c) of the initiative? Does it create or alter

EXHIBIT "A"

existing liabilities or obligations? Does it overturn or modify any statute, ordinance, regulation or judicial decision? What is the remedy, if any, of a person assigned to an unsafe school? Of a person injured as a result of an unsafe condition at school?

(b) Does the "right to Truth-in Evidence" in section 3, subdivision (d) of the initiative overturn or modify any existing statute or judicial decision? Does it overturn judicial decisions relating to the admissibility of polygraph evidence, voiceprint evidence, wiretap evidence, and hypnotically aided testimony?

(c) Does the language in section 3, subdivision (f) of the initiative that a prior felony conviction may be "used without limitation for purposes of . . . enhancement of sentence" repeal or modify any statute?

(d) Does the language in section 4, subdivision (c) of the initiative that "evidence of . . . a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment" repeal or modify any statute? Is that language consistent with section 3, subdivision (d) and section 4, subdivision (b) of the initiative?

(e) Does the language in section 7, subdivision (a) of the initiative, which prohibits plea bargaining unless, among other things "a reduction or dismissal would not result in a substantial change in sentence", refer to the maximum possible sentence or to the actual sentence the defendant receives?

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

By: Remo C. Matteoli
Chief Deputy Clerk

RCM:dms

cc: Rec.
Reg.
L.A.

F. L. KAVANAGH
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April 10, 1981

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Crim. 21775 - People v. Shirley

Gentlemen:

In the above-entitled cause counsel are requested to prepare supplemental briefs addressing the following questions:

Did the trial court err in denying appellant's pretrial motion to exclude the testimony of Catherine Crump (see Augmented Reporter's Transcript for June 19, 1979)? If so, was the error prejudicial?

Please be advised that the legal issues raised by these questions have already been extensively briefed in the case of People v. Charles Stewart Johnson, Crim. 21624, now pending before this court. In particular, counsel should avoid duplicating any of the points and authorities presented in the three amicus curiae briefs, and the three reply briefs thereto, filed in Johnson. These six briefs have previously been served on respondent herein, but not on appellant. Accordingly, file copies of the six briefs are enclosed for appellant's use; for respondent's convenience, identifying copies of the cover sheets of the same briefs are enclosed.

Counsel may raise additional legal issues not discussed in the foregoing briefs, and should apply any and all relevant legal issues to the facts of the case at bar.

Appellant's supplemental brief is to be served and filed on or before April 27, 1981. Respondent's supplemental

EXHIBIT "B"

brief is to be served and filed on or before May 11, 1981. Any reply brief by appellant is to be served and filed on or before May 21, 1981.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

By: J. L. KAVANAGH
Chief Deputy

JLK:ms

Enclosures

cc: Rec.
Reg.
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